MAR 31 2003

CLERK

No. 02-599

IN THE SUPREME COURT OF THE UNITED STATES

SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY,
Petitioners,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF AND BRIEF IN REPLY TO BRIEF IN OPPOSITION OF ALLAN J. FAVISH

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PETITIONERS' SUPPLEMENTAL BRIEF AND BRIEF IN REPLY TO BRIEF IN OPPOSITION OF ALLAN J. FAVISH

Petitioners submit this supplemental and reply brief, pursuant to Rules 15.8 and 15.6, 1) to discuss the relevance of the Court's order in ATF v. City of Chicago, No. 02-322, issued February 26, 2003, after petitioners' last filing; and 2) to respond to the Brief in Opposition of respondent Allan J. Favish.

1. The Solicitor General, in briefs filed before the Court's last order in ATF v. City of Chicago, took the position that this petition and the petition the Solicitor General filed for the Office of Independent Counsel (No. 02-954) should be held pending final disposition of ATF v. City of Chicago. The Court's order of February 26, 2003 disposed of that case without reaching the merits. There is thus no more reason to hold this case pending disposition of ATF. The Solicitor General has concluded that this case presents important issues as to which certiorari is warranted. Given the removal of ATF as a possible vehicle for decision of some of these issues, certiorari should be granted here.

The Court also has before it Oguaju v. United States Marshals Service, No. 02-5651, which the Solicitor General also contended should be held pending final disposition of ATF v. City of Chicago. While Oguaju also involves FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), the issues and facts it involves are quite different from those in this case, in at least four significant respects.

First, in Oguaju the D.C. Circuit concluded that, even if the FOIA requester's speculations about the United States Attorney's failure to fulfill his Brady obligation were correct, producing documents involving that single act of misconduct

"would not serve the FOIA's purpose of showing 'what the Government is up to.'" Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002).[1] If a FOIA requester's allegations do not implicate FOIA's purpose, the question whether the court must weigh the credibility of those allegations as part of the balancing process under Exemption 7(C) is not reached. By contrast, that question must be reached in this case, because there is no doubt that, if Favish's allegations were credible (and they are not), production of records relevant to those allegations would serve FOIA's purpose. Thus the present case, unlike Oguaju, clearly presents the question whether the court must weigh the credibility of a FOIA requester's allegations before requiring public disclosure of records implicating privacy interests.

Second, because the death of Vince Foster was a matter of public interest, multiple investigations were held, and voluminous records of these investigations were made public. The question thus arises whether that fact should carry weight in the balancing judgment required by Exemption 7(C).[2] That question does not arise in Oguaju, because there was no investigation of the United States Attorney's discharge of his Brady obligations in that case.

Third, Oguaju never got to the stage of identifying specific records, and the courts below did not order

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[1] See also Antonelli v. F.B.I., 721 F.2d 615, 619 (7th Cir. 1983) ("The contention that 'the public shares Antonelli's interest in ensuring that his convictions were not obtained as a result of a violation of the Constitution' . . . is insufficient [to overcome privacy interests under FOIA]."); Hale v. U.S. Dep't of Justice, 973 F.2d 894, 900 (10th Cir. 1992) ("public interest in the fairness of a *particular* trial is not the kind of public interest that compels disclosure under FOIA") (emphasis in original), vacated on other grounds, 509 U.S. 918 (1993).

[2] The Solicitor General's Petition addresses this issue. Petition for Certiorari, No. 02-954, at 15-18.

disclosure of any records. Thus the question of the need to show that the specific records requested are relevant to the asserted public interest never arose. By contrast, in this case the courts below did order the production of specific photographs, despite the lack of a finding of any nexus between these photographs and the asserted public interest. Thus the question of the need for such a nexus is presented here.

Finally, the D.C. Circuit noted that the privacy interest involved in Oguaju is "slight." Oguaju v. United States, 288 F.3d at 451. By contrast, the survivors' privacy interest in the present case derives from the intense and deep-seated emotion that is involved in any family's remembrance of a loved one who met a violent and unexpected death. Unfortunately, this privacy interest is likely to arise all too often in the future as the well-publicized disasters of modern life lead to investigations that in turn become the target of FOIA requests seeking images of violence and death. The questions presented by this case are of great public interest and need to be settled by this Court.

2. Favish admits that the D.C. Circuit adopted a different standard than the Ninth Circuit regarding how a FOIA requester's allegations of public interest are to be weighed under Exemption 7(C). He argues only that the D.C. Circuit was too strict in requiring "compelling" evidence of "misconduct." Brief in Opp. at 2-4. However, the existence of conflict as to such an important issue is sufficient reason for certiorari. Moreover, the D.C. Circuit was surely right that "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports . . . does [not] suggest that the congressional or independent counsel inquiries got anything wrong regarding

Foster's wounds." Accuracy in Media, Inc. v. National Park Service, 194 F.3d 120, 124 (D.C. Cir. 1999). The D.C. Circuit concluded that these purported inconsistencies not only were not "compelling" evidence, they were not even "persuasive" evidence that the investigators reported false results. Id. The Ninth Circuit's decision to the contrary will open the door to routine invasions of survivors' privacy whenever FOIA requesters make allegations of wrongdoing based on the kind of inconsistencies that are inevitable in complex investigations involving numerous witnesses and investigators.

3. Favish argues that the multiple investigations of Foster's death were properly disregarded by the court of appeals, because he believes they were all untrustworthy. Brief in Opp. at 19-20. However, Favish's accusations of falsification and cover-up, incredible as they are with respect to only one investigation, become even more so when extended to the five investigations that have already occurred. That factor, as well as the extensive public disclosures that already have taken place in connection with these investigations, is surely relevant to the balancing judgment that Exemption 7(C) requires when public disclosure of records implicating privacy interests is sought.

4. Favish argues that the factual question of whether there was a nexus between the photographs and the asserted public interest is not appropriate for certiorari. Brief in Opp. at 5-6. But neither the Ninth Circuit nor the district court made a finding on that issue, even though the parties and the dissenting judge raised it. The Court need not make a factual finding itself; it need only recognize that the courts below failed to do so, in contrast to what other courts of appeals have required. Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574,

588 (D.C. Cir. 1987); Hale v. United States Dep't of Justice, supra, 973 F.2d at 900.

Moreover, even Favish's explication of his claimed nexus depends, in the case of two photographs the courts below ordered disclosed, on whether they show "blood that pooled" and "blood flow patterns" on the corpse. Brief in Opp. at 12, 13. That illustrates perfectly the D.C. Circuit's observation, quoted by the dissenting judge below, that "'we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic.'" Pet. App. at 25 (quoting Accuracy in Media, 194 F.3d at 125). In short, even under the Ninth Circuit's own test -- allowing disclosure of photographs that are not "graphic, explicit, and extremely upsetting" (Pet. App. at 17) -- there would be no nexus between the asserted public interest and the photographs disclosed by that court. The Ninth Circuit not only has failed to address the nexus issue, but has ordered disclosure of photographs that, under the terms of its own test, could not have any nexus to the public interest that Favish asserts.

5. Favish admits that the Ninth Circuit adopted the "graphic, explicit, and extremely upsetting" test as the standard for determining whether survivors' privacy interests are invaded but contends, inexplicably, that it adopted that test for this case only. Brief in Opp. at 13-14. Favish does not bother to defend this test on its merits. It is, indeed, indefensible, and there is no reason to believe the Ninth Circuit will not apply it in future cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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